

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION

APPEAL FROM ORDER NO.679 OF 2022

WITH

INTERIM APPLICATION NO.3487 OF 2022

WITH

APPEAL FROM ORDER (ST.) NO.97977 OF 2020

WITH

APPEAL FROM ORDER NO.107 OF 2023

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Ishwari Gulabrai Dasani and Another ...Appellants

vs.

Dhanashree Constructions and Others ...Respondents

Mr. Atul Damle, Senior Advocate a/w. Mr. Sandeep Sharma and Mr. Sanjeev Rapolu, for the Appellants.

Mr. Dhruvad Patil, for Respondent No. 1.

Mr. Rohit Sakhadeo, for Respondent No. 12-PCMC.

CORAM : N. J. JAMADAR, J.

DATE : MARCH 08, 2023

P.C.:

1. This appeal under Order 43 of the Code of Civil Procedure, 1908 is directed against an order dated 21st January, 2022 passed by the learned Civil Judge, Senior Division, Pune on an application (Exhibit 100) in Special Civil Suit No. 563 of 2019 seeking an interim injunction against defendant Nos. 1 and 2, from carrying out construction on the suit property.

2. The appellants/ plaintiffs claimed to have purchased the property described in paragraph 19 of the plaint (the suit property) from Sunil Kevalchand Oswal and others. The defendant Nos. 3 to

11 are owners of the property described in paragraph 1(b) of the plaint. The defendant Nos. 3 to 11 entrusted the development of the suit property to defendant No. 2. It transpired that the defendants by committing encroachment over the portions of the plaintiffs property started development of the property. The plaintiff lodged grievance with the planning authority. However, since no action was taken by the concerned authorities, the plaintiff was constrained to institute a suit seeking declaration that they are the owners of the suit property described in paragraph 1(a) of the plaint and the defendants do not have any right, title and interest in the suit property and the consequential reliefs including a direction to the Superintendent of land record to carry out the measurement of the suit property and de-marcate the boundaries, and removal of the encroachment and delivery of the possession of the encroached portion of the suit property and damages.

3. In the said suit, the plaintiff preferred an application for temporary injunction (Exhibit 5). The said application came to be rejected by the trial Court by an order dated 28th February, 2020 on the count that the plaintiff themselves were not aware as to where the suit property was located and no encroachment, allegedly committed by the defendants, was discernible from the documents

filed on behalf of the plaintiff.

4. The plaintiff preferred an application for appointment of a cadestral surveyor as a Court Commissioner (Exhibit 84) to measure the suit property and identify its exact location. By an order dated 26th February, 2021 the Superintendent of Land Record Pune was appointed as a Court Commissioner with a direction to measure entire survey No. 97 along with its sub-survey numbers and prepare detail map with respect to measurement of each sub-survey numbers. A report came to be submitted by SLR dated 22nd October, 2021.

5. Based on the said report, the plaintiffs again preferred an application for interim injunction (Exhibit 100) seeking to restrain the defendant Nos. 1 and 2 from carrying out construction on the entire suit property and utilizing the FSI.

6. By the impugned order, the learned Civil Judge was persuaded to reject the application holding inter alia that no prima facie case for grant of injunction was made out. Likewise, it was held that balance of convenience was not in favour of the plaintiffs and refusal to grant injunction would not cause irreparable loss to

the plaintiffs. Aggrieved by the impugned order, the plaintiffs are in appeal.

7. Heard Mr. Atul Damle, the learned senior counsel for the appellants, Mr. DhruPAD Patil, learned counsel for respondent No. 1 and Mr. Rohit Sakhadeo, learned counsel for respondent No. 12.

8. Mr. Damle, would urge that the learned Civil Judge committed a grave error in declining to exercise the discretion in favour of the plaintiffs despite a clear and categorical report of the cadastral surveyor that there was encroachment over the plaintiffs land. A strong emphasis was laid on the report of the cadastral surveyor. To bolster up the submission that the cadastral surveyor had clearly shown the encroachment over the plaintiffs property, reliance was placed on the map (Exhibit D collectively, page 260). Mr. Damle urged that the interest of the plaintiffs thus deserves to be adequately protected lest the plaintiffs would suffer irretrievable injustice.

9. In opposition to this, Mr. DhruPAD Patil, learned counsel for defendant No. 1 submitted that the entire project is developed. Occupation certificate has also been granted. Grant of injunction, at

this stage, especially when there is a serious dispute about the identity of the property, over which the plaintiffs claim proprietary rights, and factum of encroachment are in the realm of uncertainty.

10. I have perused the material on record and the impugned order carefully.

11. Evidently, the thrust of the application is report submitted by the Commissioner post measurement of the suit property. The edifice of the case is thus sought to be built on the report of the Commissioner. The trial Court was not prepared to place implicit reliance on the report of the Commissioner as, in the view of the trial Court, the report of the Commissioner did not support the cause of the plaintiff to the extent desired by the plaintiff. It was noted that the rectangular portion of the land which was alleged to be encroached upon by the defendants was shown by the plaintiffs. Secondly, the learned Judge was of the view that the contents of the map were required to be proved at the trial.

12. The aforesaid approach of the learned Civil Judge does not appear to be unjustifiable. It is not the case that cadastral surveyor on the basis of the measurement arrived at a legitimate conclusion

that a certain portion of the property was encroached upon by the defendants. In fact, there is serious discrepancy as to the area which the defendants allegedly encroached upon. In paragraph No. 8 of the impugned order, the learned Civil Judge correctly observed that the area allegedly encroached upon by the defendants (according to the plaintiffs) shown in the rectangular shape on the map does not at all tally with the portion shown in the rough sketch annexed to the plaint.

13. In substance, the uncertainty which prevailed when the first application for temporary injunction (Exhibit 5) came to be rejected by the trial Court, could not be resolved even after the submission of the report by the Court Commissioner. Nay, it seems, the confusion is further confounded. The controversy can only be resolved by adducing evidence at the trial.

14. In the aforesaid view of the matter, I am not inclined to interfere with the impugned order. However, it needs to be clarified that the defendants shall not be entitled to claim equities.

Hence, the following order.

ORDER

- 1] The appeal stands dismissed.
- 2] The defendants, however, shall not be entitled to claim equities on account of rejection of the application for interim relief, in the event, it is ultimately found that the defendants had committed encroachment over the property of the plaintiffs.
- 3] No costs.
- 4] In view of the dismissal of the appeal, the interim application does not survive and accordingly stands dismissed.

(N. J. JAMADAR, J.)